BEAUFORT INTERNATIONAL HOTELS LTD.

v.

TANJONG ARU HOTEL SDN. BHD.

HIGH COURT BORNEO
ABU MANSOR ALI J
[CIVIL SUIT NO. K.1403 OF 1987]
26 JANUARY 1988

CIVIL PROCEDURE: *Interlocutory injunction - Application for extension of injunction - Preliminary objection on point of law - Whether failure to pray for relief fatal to the grant of injunction - Whether omission can be made good by affidavit evidence.*

Upon the plaintiffs undertaking to file a statement of claim and a summons in chambers in accordance with the draft produced the Court granted an injunction restraining the defendants its agents and directors from *inter alia* terminating or purporting to terminate the hotel management agreement dated 16 July 1982 and from disturbing or otherwise interfering with the plaintiff's lawful occupation of the Tanjong Aru Beach Hotel.

The writ of summons filed subsequently contained prayers for the various injunctions but did not contain any prayers for a declaration and/or specific performance of the management agreement dated 16 July 1982.

The plaintiffs subsequently filed an application for an extension of the *exparte* injunction and the defendants raised a preliminary objection on a point of law. The defendants objection was that in the absence of the prayers for a declaration and/or specific performance of the management agreement the injunction being merely an ancillary relief could not stand by itself.

Held:

The plaintiffs should have pleaded and prayed for a declaration that the notice of termination of the agreement was invalid and/or for specific performance and that there is therefore an absence of the issues to be tried and determined. Since there is no issues to be tried it is thus unjust and inconvenient that the injunction should remain.

The omission of the prayer for a declaration and/or for specific performance cannot be made good by affidavit evidence.

[Injuction dissolved.]

Cases referred to:

Wong L.K. v. Peter Lo [1972] 1 MLJ 138
Holiday Inn v. Hotel Enterprise [1976] 1 MLJ 213
North London Railway Co. v. Great Northern Railway Co. [1883] 11 QBD 30
Siskina [1979] AC 210
Chief Constable Of Kent v. V. & Anor. [1983] 1 QBD 34
Pollard v. Photograhic Co. [1888] Ch Vol XL
Keith Prowse & Co. v. National Telephone Co. [1894] 2 Ch 147
Robb v. Green [1895] 2 QBD 315
American Cyanamid Co. v. Ethicon [1975] AC 396
S.F. International v. Transcon [1985] 2 MLJ 62
Gold Ores Reduction [1892] 2 QBD 14
National Company For Foreign Trade v. Kayu Raya [1984] 1 CLJ (Rep) 283
Vethanayagam v. Karuppiah [1968] 1 MLJ 283

Other source referred to:
Injunction, David Bean, 3rd Edn., p. 4

For the plaintiff - Valentine Willie; M/s. Skinner Lind Robertson Willie Wong & Chin.
For the defendant - Cecil Abraham; M/s. Ronny Cham & Co.

JUDGMENT

Abu Mansor Ali J:

On 26 January 1988 I made an open Court order dissolving the *ex parte* interlocutory injunction I granted to the plaintiffs on 21 December 1987 on the strength of a draft writ and draft summons-in-chambers which I made returnable to 28 December 1987 and, on defendants having been duly served the Court order, I adjourned for open Court argument to 26 January 1988. I said I would give reason for that decision. I do so now.

Upon the plaintiffs undertaking to file a statement of claim according to the draft produced and also filing a summons-in-chambers as per the draft the Court granted on 21 December 1987 *ex parte* injunction in terms as follows:

(a) an injunction restraining the defendants, its directors, and agents from terminating or purporting to terminate the hotel management agreement dated 16 July 1982;

(b) an injunction restraining the defendants, its directors or agents from disturbing or otherwise interfering with the plaintiffs' lawful occupation of the Tanjong Aru Beach Hotel premises;

(c) an injunction restraining the defendants its officers from operating bank accounts of the Tanjong Aru Beach Hotel contrary to the said management agreement;

(d) an injunction restraining the defendants and its officers from harassing or interfering with the rights and duties and obligations of the plaintiffs under the said management agreement the plaintiffs' management and operation of the Tanjong Aru Beach Hotel.

The writ and statement of claim subsequently filed contained the prayers (a) to (d) as above only but no prayers for a declaration and/or specific performance of the said agreement. The facts of the case are as follows. The plaintiffs and defendants signed a management agreement on 16 July 1982. Under it the plaintiffs were to manage the Tanjong Aru Beach Hotel owned by the defendants in accordance with the terms of that management agreement. For sometime the parties had good relationship. Of late, however, there was disharmony and discord between them each side alleging breaches of the said agreement committed by the other the facts of which need not concern us for the purpose of this judgment. Suffice to say there were complaints by the plaintiffs of improper interference by the defendants in the conduct of the hotel's management by the plaintiff, denied of course by the defendants. Things came to a head and on 21 December 1987 afternoon the defendants served the plaintiffs a notice of termination of the management agreement citing several alleged breaches of the said management agreement which the plaintiffs denied. The plaintiffs refused to accept the said termination and filed the above summons-in-chambers for injunction as granted.

Turning to the arguments in open Court, in his application for extension of the *ex parte* injunction, Mr. Valentine Willie, besides giving the history of the parties' relationship, enumerated the charges of alleged breaches of the said management agreement which the defendants had cited against the plaintiffs when giving the said notice of termination of the management agreement on 21 December 1987. The plaintiffs refused to accept the notice of termination and informed the defendants of their position.

It is settled law that the onus of making a case for the extension of a mandatory injunction granted is on the party applying. See *Wong L.K. v. Peter Lo* [1972] 1 MLJ 138). In *Holiday Inn v. Hotel Enterprise* [1976] 1 MLJ 213, an application for extension of a mandatory injunction, it was held that the question the Court need ask itself was is there a substantial case to be tried and pending the hearing of the case the Court will as far as possible keep the matters in *status quo*.

It was with these principles in mind that the Court asked the plaintiffs why, inspite of their denial of having committed the breaches of the agreement complained of by the defendants, the plaintiffs did not deem it fit to plead in the writ for a declaration challenging the validity of the alleged termination of the agreement on 21 December 1987. In order to enable the plaintiffs' Counsel to consider the matter of the non-inclusion of this prayer properly, the Court adjourned the open Court application for about fifteen minutes so that plaintiffs' Counsel may properly take instruction and take stock of the position. When we resumed again the learned Counsel for the plaintiffs made known to the Court the plaintiffs would proceed in its application without the necessity of having to amend the plaintiffs' writ to include the prayer for declaration of invalidity of the said notice of termination. With that the application proceeded again and the learned Counsel then took the Court through the several authorities on the contractual position of the plaintiffs in relation to defendants under the management agreement. He also cited authorities on the law on injunction and finally praying for the remedy of injunction rather than that of damages. The Court in passing did consider these authorities but as it turned out the Court's decision to dissolve the injunction turned on a ruling on a preliminary point raised by the defendants' Counsel and replied to by the plaintiffs' Counsel. At the outset of his reply, Mr Cecil Abraham, raised a preliminary point of law. He submitted that the *ex parte* injunction granted on 21 December 1987 must be based on the writ subsequently filed [encl. (1)]. He said looking at the statement of claim filed what the plaintiffs should be praying for are two declarations:

(a) a declaration that the purported termination of the said management agreement on 21 December 1987 was not in accordance with the said management agreement; and

(b) seeking a specific performance of the management agreement. Pending the determination of these two prayers, plaintiffs then pray for the interlocutory injunctions they are seeking to extend. He submitted further that an injunction is not a cause of action but only an ancillary relief and it must have a peg to hang on.

Learned Counsel for the defendants further submitted that the fact that plaintiffs' claim, by virtue of amendment, also include an alternative claim for damages, has not made any difference. Firstly, he submitted that since there is a plea for damages it is an admission on plaintiffs' part that an injunction would not be necessary as damages would be an adequate remedy. Secondly, damages can only come into issue if and when breaches of contract had been proved. Since the *ex parte* injunction was granted when there was absence of a cause of action he prays that it may be dissolved without going into the merits.

Learned Counsel for the defendants then went on to cite a number of authorities on the point that there must be a cause of action before an injunction in aid of can be granted. Defendants' Counsel drew Court's attention to the case of *Holiday Inn v. Hotel Enterprise Ltd.* [1976] 1 MLJ 213, 214 [No. 1 of encl. (9A)] where the application was for an interlocutory injunction and granted. The facts were somewhat similar to the facts to the present application where the plaintiffs commenced an action for a declaration that the management agreement was in full force, specific performance by the defendants of its terms and a prayer for a

injunction restraining the defendants from interfering with the plaintiffs' duties and obligations under the management agreement. He told the Court that the plaintiffs' writ or statement of claim when compared is devoid of these prayers, defence Counsel submitted.

The next defence Counsel cited "*Injunction*" by David Bean, 3rd Edn., at p. 4, where the learned author says there must be an "overriding requirement: the applicant must have a cause of action in law entitling him to substantive relief [*North London Railway Co. v. Great Northern Railway Co*. [1883] 11 QBD 30]". Defendants' Counsel then next cited the *Siskina* [1979] AC 210, 256 (p. 17 of encl. 9A) where Lord Diplock says:

> A right to obtain an interlocutory injunction is not a cause of action. It cannot stand on its own. It is dependent upon there being a pre-existing cause of action against the defendant ... The right to obtain an interlocutory injunction is merely ancillary ... It is granted to maintain the *status quo* pending the ascertainment by the Court of the rights of the parties ...

He submitted the relevance of this case to the present matter is that the Court will have to make proper determination of subsistence of the said management agreement. If the Court holds that the termination was invalid then it orders specific performance of it until 1992. It will also properly grant a permanent injunction thereafter.

In addition, the defendants' Counsel in support also cited *Chief Constable of Kent v. V. & Anor*. [1983] 1 QBD 34, 49, where the principle in *Siskina* was approved which shows that an injunction will only issue where the applicant can show an apparent pre-existing legal or equitable right which requires protection.

Finally, learned defence Counsel cited *Syarikat Tan Teow Poh Sdn. Bhd. v. Wah Bee & Co. Sdn. Bhd. & Ors*., Penang Civil Suit No. 866 of 1985 (unreported) where my brother, Mohd. Dzaiddin, J, dissolved an injunction earlier granted as there was absence of a cause of action and no statement of claim was filed. On appeal, the Supreme Court upheld his decision.

For the plaintiffs, Mr. Valentine Willie in reply concedes that an injunction by itself is not a cause of action. He submitted that the defendants have committed breaches of the management agreement for which the plaintiff is seeking the five injunctions and the alternative damages. The prayer for a permanent injunction should also be decided at the trial, be submitted.

Learned Counsel contended that for the breaches the plaintiffs can go for specific performance, declaration or injunctions. He further contended that the terms of the injunction prayed for amount to a declaration that the contract is valid and the notice of its termination invalid. He submitted it is superfluous for plaintiffs to ask for specific performance or a declaration as the injunctions, if granted at the trial, would mean the Court considers the contract is valid and subsisting and can be specifically enforced.

On the cases cited by defendants, plaintiffs' Counsel said they can be distinguished. As regards the *Siskina's* case learned Counsel says there has been misreading of the case by the defendants' Counsel which is duly denies. He said the judgment in the *Siskina* case concerned with plaintiff applying to issue a writ when there was no cause of action in England and no defendant was amenable to the jurisdiction. Whilst in our present matter the management agreement was subject to Malaysian law. In the *Constable of Kent's* case there was absence of contractual right between plaintiff and defendant. The constable was only a police officer administering criminal law and he had no right to apply for an injunction. As for *Syarikat Tan Teow Poh Sdn. Bhd. v. Wah Bee & Co. Sdn. Bhd.'s* case, no statement of claim was filed, hence the learned Judge could not find the cause of action.

Plaintiffs also cited three cases, *Pollard v. Photograhic Co*. [1888] Ch Vol XL, in which a defendant photographer was restrained from selling or exhibiting copies of photographs taken by him on the ground that there was an implied contract not to do so. Then he cited *Keith, Prowse & Co. v. National Telephone Co.* [1894] 2 Ch 147, where an injunction was granted to restrain the defendant, which was a telephone company, from disconnecting the wire after it had received rental payment a day beyond the last quarter the rental was to be determined on the ground that the defendants' acceptance created a waiver. He also cited *Robb v. Green* [1895] 2 QBD 315 where the defendant plaintiff's employee was restrained from copying the addresses of customers in the master's order book in order that he may solicit orders from plaintiff's customers when he left plaintiff's services. In addition, plaintiffs also cited the *Dorchester's* case to show that prayers in that case were only for injunction and no other.

On these submissions I agree with defendants' contention that in none of these cases cited was the issue of whether there was a cause of action before the grant of an injunction discussed. As for *Dorchester's* case, it was a case of a reference to arbitration and injunction only was applied for in aid of that reference, the Judge granting the relief pursuant to the English Arbitration Act. Moreover, in the light of modern cases such as *American Cyanamid Co. v. Ethicon* [1975] AC 396 and other modern cases as *Siskina* where the accepted test now is the presence of serious matters to be tried, I am doubtful how much reliance can be placed on these cases apart from their not discussing the preliminary points raised by the defendant and on the matter of whether or not the interlocutory injunction merits being extended. In view of the principle stated in the *Holiday Inn v. Hotel Enterprise Ltd*. [1976] 1 MLJ 213, where the Court has to find if there are substantial matters to be tried and the interlocutory injunction is to preserve the *status quo*, if relevant, then it must be read with the development of subject of injunction which has gone even so far as to deny it where applicant's right may be affected by the "special factor" cases such as where plaintiff delayed in applying and has slept on his rights or the balance of convenience disallows it. In this case the plaintiff has not properly pleaded the cause of action, sad to say, even when the Court gave them ample chance to consider the plaintiff's position.

In conclusion, I find the defendants have succeeded in their application that the Court do dissolve the *ex parte* injunction granted on 21 December 1987. Before that, the Court considered that injunction is a discretionary remedy, the granting of it is based on judicial principles. In the case of *American Cyanamid Co. v. Ethicon* [1975] AC 396, the principle was before granting it the Court must discover that there are serious issues to be tried and determined. Pending the determination of these issues, the interlocutory injunction is granted to preserve the *status quo* of the parties, as stated.

It is settled and trite law that the Court can only decide on matter that are pleaded before it. It is basic that it is for the plaintiffs to spell out their cause of action so that the defendants will have notice of what is being alleged against them to have the issues to be defined and thus to enable them to defend. It is also settled law that the plaintiffs are to make suitable amendment, if necessary. It is not for the Court to formulate the plaintiffs' claim or infer from the pleadings. To my mind, the relief of the action, such as declaration and specific performance, must be pleaded by the plaintiffs and it is also settled law that their omission can in no way be made good or supplied by affidavit evidence. (See *S & F International v. Trans-con* Engineering Sdn. Bhd. [1985] 2 MLJ 62). In *Gold Ores Reduction* [1892] 2 QBD 14 and *National Company for Foreign Trade v. Kayu Raya* [1984] 1 CLJ (Rep) 283, the Court held that the statement of claim must be complete. When judgment is given on matters that are not pleaded, it has been held to be cause for an order of retrial. The plaintiffs' writ without

pleading the required reliefs in my view was in no better position than the applicant in *Syarikat Tan Teow Poh Sdn. Bhd. v. Wah Bee Sdn. Bhd.* (*supra*) where no writ was filed. I find merit in the argument of the defendants' Counsel that the plaintiffs should have pleaded and prayed for a declaration that the notice of termination was invalid and also for specific performance and it is clearly settled that the interlocutory injunction is only given to maintain the *status quo* pending that determination.

With respect to the learned Counsel for the plaintiffs, I find, in the absence of specific prayers for the said declaration that the notice of termination was invalid and the management agreement subsisting and for specific performance, there is therefore absence of issues to be determined at the trial, shortly there are no serious questions to be tried. To infer the issues and the causes of action is for the Court to formulate the claim of the plaintiffs. Since there are no issues to be tried, I find it is unjust and inconvenient that the term of the *ex parte* injunction should be left hanging on defendants' head indefinitely and will not serve the purpose it should have.

As regards the plaintiffs' application for a permanent injunction, I also find merit in defence submission that it is only upon the Court having decided on those absent issues that the management agreement subsist that there can be a permanent injunction. This again very much depends on the plaintiffs' pleading seeking that declaration. In that absence, there was no basis upon which the Court can make that order. In *Vethanayagam v. Karuppiah* [1968] 1 MLJ 283, it was settled that a temporary injunction will not be granted where a permanent injunction cannot be obtained.

Having regard to the submission made and having regard to all the authorities before me and after considering the preliminary point raised, I find that the balance of convenience lies in my exercising my discretion to dissolve the injunction I granted on 21 December 1987 for reasons I gave. I also ordered, on the application of the defendants' Counsel, that there be inquiries as to damages upon the plaintiffs' undertaking by the Registrar on a date to be fixed. The defendants will also have costs to be taxed.

Following the dissolution of the *ex parte* injunction, applicants' Counsel applied for an "Erinford injunction". I refused it following the Supreme Court's judgment in *Permodalan MBF v. Emtex* (Civil Appeal No. 497/86) which frowned on that procedure and at the same time there was no appeal yet pending before me.

Also found at [1988] 2 CLJ 638